

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

JAMES JACKSON,

Defendant.

CR. NO. S-03-0258 EJG

ORDER DENYING MOTION TO AMEND
PRESENTENCE REPORT

Defendant, a federal prisoner proceeding pro se, has filed a motion for an order directing the Probation Office to amend the presentence report in this case. Specifically, defendant wants the report to include language that a firearm was not used in connection with the drug trafficking crime to which defendant pled guilty. For the reasons that follow, the motion is DENIED.

Background

On February 27, 2004, defendant was convicted, pursuant to his plea of guilty, of one count of conspiracy to distribute and possess with the intent to distribute cocaine base, in violation of 21 U.S.C. § 841(a)(1) and 846. As part of the plea agreement,

1 defendant admitted that he possessed a firearm in relation to the
2 offense. (Plea Agreement, Docket No. 39). In exchange for
3 defendant's plea of guilty the government agreed to dismiss the
4 remaining counts in the indictment, including possession of a
5 firearm during and in relation to a drug trafficking crime, in
6 violation of 18 U.S.C. § 924(c). On May 7, 2004, defendant was
7 sentenced to a term of 168 months imprisonment.¹ As part of the
8 Judgment the court recommended to the Bureau of Prisons that
9 defendant be allowed to participate in the 500-hour Bureau of
10 Prisons Substance Abuse Treatment Program. (Judgment, Docket No.
11 49).

12 Discussion

13 In the instant motion defendant contends that he has been
14 deemed ineligible to participate in the 500-hour drug treatment
15 program because the presentence report states that he possessed a
16 firearm at the time of the commission of the offense of which he
17 was convicted. Defendant claims this statement is erroneous
18 since the gun count was dismissed by the government. Citing
19 Federal Rule of Criminal Procedure 32(i)(3)(C), defendant
20 maintains that the court must amend the presentence report to
21 clarify that defendant's possession of the gun was not related to
22 the drug offense, apparently believing this will make him

23
24 ¹ Defendant's sentence was subsequently reduced to 135 months of imprisonment,
25 pursuant to 18 U.S.C. § 3582(c)(2) based on the lowering of the sentencing range for crack
cocaine by the Sentencing Commission. (Order Reducing Sentence, Docket No. 83)

1 eligible for participation in the Bureau of Prisons' drug
2 treatment program.

3 Defendant's arguments are legally misplaced and factually
4 erroneous. Rule 32(i)(3) lists a court's obligations concerning
5 factual findings contained in the presentence report. The rule
6 provides that the court: a) **may** accept undisputed portions of the
7 report; b) **must** rule on disputed portions, or determine that a
8 ruling is unnecessary; and c) **must** attach a copy of the court's
9 determinations on any factual disputes to the presentence report.
10 The rule is simply inapplicable to the instant situation. The
11 presentence report does not contain a dispute about whether
12 defendant had a gun in connection with the drug offense. Rather,
13 the report explains that pursuant to the plea agreement, the
14 parties agree the base offense level will be increased by two
15 levels due to the finding of a gun in defendant's bedroom. The
16 report also summarizes defendant's explanation for the presence
17 of the gun, which is that he purchased it for personal
18 protection.

19 No objections were made prior to or during the sentencing
20 proceedings concerning the specific offense characteristic for
21 gun possession that resulted in a two level increase in the base
22 offense level. Nor could there have been an objection without
23 running afoul of the plea agreement. That agreement contains the
24 parties' stipulation that defendant possessed the gun. This
25 stipulation was in exchange for the government's agreement to
26

1 dismiss the § 924(c) count. Had defendant been convicted of that
2 count, he would have faced an additional five years of
3 **consecutive** imprisonment. See 18 U.S.C. § 924(c)(1)(A)(i).
4 Instead, the two level enhancement added 33 months to his
5 sentence. See U.S.S.G. Sentencing Table (comparing guideline
6 ranges for total adjusted offense level of 33, with a criminal
7 history category of I (135 - 168 months) to level 35 (168 - 210
8 months).

9 While it is true that the court recommended that defendant
10 participate in the Bureau of Prison's 500-hour substance abuse
11 treatment program, it was but a recommendation. Eligibility
12 determination for that program remains with the Bureau of
13 Prisons. See 18 U.S.C. § 3621(e). Questions concerning those
14 determinations must be directed to that agency.

15 Conclusion

16 Based on the foregoing, defendant's motion for an order
17 amending the presentence report is DENIED.

18 IT IS SO ORDERED.

19 Dated: September 3, 2010

20 /s/Edward J. Garcia

21 EDWARD J. GARCIA, JUDGE
22 UNITED STATES DISTRICT COURT
23
24
25
26